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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 EDWARD MAKARON, on behalf of himself
14 and all others similarly situated,

15 Plaintiff,
16 v.
17 ENAGIC USA INC.,
18 Defendant.

Case No. 2:15-CV-05145-DDP-E

**DEFENDANT ENAGIC USA, INC.'S
NOTICE OF MOTION AND MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT**

19 Assigned to:
20 The Honorable Dean D. Pregerson
21 Referred to:
22 Magistrate Judge Charles F. Eick

23
24
25 Hearing Date: November 9, 2015
26 Time: 10:00 a.m.
27 Dept. 3

28 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

29 PLEASE TAKE NOTICE that on November 9, 2015 at 10:00 a.m., or as soon thereafter
as the matter may be heard, in Department 3 at 312 N. Spring St., Los Angeles, CA 90012,

1 defendant Enagic USA, Inc. (“Enagic”) will, and hereby does, move this Court pursuant to Rules
2 8, 9, and 12 (b)(6) of the Federal Rules of Civil Procedure for an order dismissing the First
3 Amended Complaint (Doc. No. 15) (the “Amended Complaint”) of Plaintiff Edward Makaron, on
4 behalf of himself and all others similarly situated (“Plaintiff”).
5

6 Pursuant to Federal Rule of Civil Procedure 12(b)(6), Enagic, moves to dismiss Plaintiff’s
7 Amended Complaint as follows:

8 1. Plaintiff filed this lawsuit on July 8, 2015. On August 21, 2015, Enagic timely
9 filed its motion to dismiss (Doc No. 9) Plaintiff’s complaint and served Plaintiff by the CM/ECF
10 system. A month later, after receiving and reviewing Enagic’s motion to dismiss, Plaintiff filed
11 the Amended Complaint. The Amended Complaint was filed in violation of Fed. R. Civ. P.
12 15(a). Rule 15(a) allows an amendment if it is filed within 21 days after service of the complaint,
13 or 21 days after service of a responsive pleading or a motion under Rule 12(b), (e), or (f),
14 whichever is earlier. In all other cases, a party must obtain leave of court or consent of the
15 opposing party before filing an amendment. Fed. R. Civ. P. 15(a). The Amended Complaint was
16 not filed within 21 days after service of the complaint, or 21 days after service of Enagic’s motion
17 to dismiss. Further, Plaintiff did not obtain leave of court or consent of Enagic before filing the
18 Amended Complaint. For this reason, the Court should strike the Amended Complaint.
19

20 2. Like his original complaint, Plaintiff’s Amended Complaint for negligent and
21 intentional violations of the Telephone Consumer Protection Act, 47 U.S.C § 227, et seq.
22 (“TCPA”) should be dismissed pursuant to Rule 12(b)(6) because the Amended Complaint does
23 not allege facts that demonstrate that Enagic initiated a telephone call to Plaintiff’s cellular
24 telephone line or that Enagic made telemarketing calls to Plaintiff on a number registered on a do-
25 not-call list. Rather, the Amended Complaint simply alleges that a Gary Nixon and an unnamed
26 person tried to recruit Plaintiff to become a sales person for Enagic. The Amended Complaint
27
28

1 does not allege any facts to establish either Gary Nixon or the unnamed person is a representative
2 of Enagic and was acting on behalf and at the direction of Enagic.

3 3. Federal courts addressing the sufficiency of the allegations in a TCPA complaint
4 require “more than a bare assertion of [the TCPA] elements, looking instead to the plaintiff’s
5 factual allegations to determine whether a TCPA claim can be sustained.” *Sepehry-Fard v. MB*
6 *Fin. Serv.*, 2014 WL 2191994, at *3-4 (N.D. Cal. May 23, 2014), citing, *Kramer v. Autobytel,*
7 *Inc.*, 759 F.Supp.2d 1165, 1171 (N.D.Cal. 2010); *see also, Strand v. Corinthian Colleges, Inc.*,
8 2014 WL 1515494, (W.D. Mich. April 17, 2014) (dismissing a TCPA complaint because
9 “[n]otice pleading, under *Twombly* and *Iqbal*, necessarily requires that a plaintiff plead the
10 telephone number in question to ‘raise a right to relief above the speculation level’” (citing *Bell*
11 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

12 4. As discussed in more detail in the accompanying Memorandum, the conclusory
13 allegations in the Amended Complaint are inadequate to state a claim upon which relief should be
14 granted and the Amended Complaint therefore should be dismissed.

15 5. The grounds and precedent for this motion are more fully set forth in Enagic’s
16 Memorandum in Support of its Motion to Dismiss, filed contemporaneously herewith and
17 incorporated by reference into this motion.

18 WHEREFORE, Enagic USA, Inc. respectfully requests that this Court dismiss all of
19 plaintiff’s claims against it and that this Court grant such other relief to which Enagic is justly
20 entitled.

1 Dated: October 5, 2015

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RESPECTFULLY SUBMITTED,

Dwight M. Francis, *Pro Hac Vice*
GARDERE WYNNE SEWELL, LLP
1601 Elm St., Ste. 3000
Dallas, TX 75201

/s/ Dwight M. Francis

Attorneys for ENAGIC USA, INC.

PROOF OF SERVICE

STATE OF TEXAS, COUNTY OF DALLAS

I am employed in the County of Dallas; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1601 Elm St., Ste. 3000, Dallas, TX 75201.

On October 5, 2015, I served the following document(s) described as **DEFENDANT ENAGIC USA, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Todd M. Friedman
Suren N. Weerasuriya
Adrian R. Bacon
LAW OFFICES OF TODD M. FRIEDMAN
324 S. Beverly Dr. #725
Beverly Hills, CA 90212
TEL: 877-206-4741
FAX: 866-633-0228

- BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.
- STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2015, at Dallas, Texas.

/s/ Wendi M. Taylor
Wendi M. Taylor